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Supreme Court of the United States.

October Term, 1976.

No. 76-1438

CATAMORE ENTERPRISES, INC.,
PETITIONER,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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CITATIONS TO THE APPENDIX.

All citations are to the printed record on appeal, which was designated:

P — Appendix volume containing relevant docket entries and portions of pleadings, motions, interrogatories, verdict, judgment and opinion (P-1 - P-438)

C — Appendix volume containing requests to charge, charge to the jury and comments on and exceptions to the charge (C-1 - C-339)

E — Appendix volumes containing trial exhibits ("PX" denotes a plaintiff's exhibit; "DX" denotes a defendant's exhibit) (E-1 - E-960)

T — Appendix volumes containing the transcript of all proceedings below (T-1 - T-3900)

Relevant portions are set forth in the Appendix to this petition.

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

CATAMORE ENTERPRISES, INC.,

PETITIONER,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment and order rendered by the United States Court of Appeals for the First Circuit, on September 30, 1976 and entered on January 17, 1977, (upon denial of Petitioner's Petition for Rehearing) reversing a judgment entered in favor of the Petitioner by the District Court of the United States for the District of Rhode Island.

OPINIONS BELOW

The Opinions of the Court of Appeals have not yet been reported. A copy of both Opinions are attached to this Petition as Exhibits B and D of the Appendix to the Petition.

JURISDICTION TO REVIEW

The Judgment sought to be reviewed was rendered on September 30, 1976 and entered on January 17, 1977. A Petition as Exhibits B and D of the Appendix to the Petitioner on October 14, 1976, and the United States Court of Appeals for the First Circuit denied the Petition for Rehearing in an Opinion dated January 17, 1977.

Jurisdiction is granted to the Supreme Court under 28 U.S.C. §1254(1).

Jurisdiction of the United States District Court of the District of Rhode Island was invoked under 28 U.S.C. §1332.

QUESTIONS PRESENTED

1. May a Court of Appeals vacate a jury verdict on the basis of an "error" in the Charge, when that Charge was given at the request of the Appellant, and when the Appellant also failed to object to that Charge in accordance with Federal Rules of Civil Procedure 51?

2. Does a Motion for a directed verdict, which did not assert or even mention the grounds on which the Court of Appeals later based its Order vacating the jury verdict, excuse an Appellant's failure to make an objection in accordance with the Federal Rules of Civil Procedure 51, and preserve for appeal the "error" not objected to and not part of the Motion for a directed verdict?

3. Where conflicting evidence has been submitted to the jury, and the Charge properly permitted the jury to decide among alternative versions of the facts from the evidence, may a Court of Appeals assume only one version of the facts and issue an Opinion and Order which removes the determination of other versions of the facts from the jury on a second trial?

STATUTES INVOLVED

U. S. Constitution Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U. S. C., Federal Rules of Civil Procedure, Rule 51

Instructions To Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

The Judgment on Petitioner's Counterclaims followed a jury trial of 56 trial days, and a sequestered jury deliberation encompassing nine days. At trial Respondent (hereinafter referred to as "IBM"), a New York Corporation, was plaintiff, and Petitioner (hereinafter referred to as "Catamore"), a Rhode Island Corporation, was defendant and counterclaimant. Catamore's counterclaims concerned negligence, fraud, and breach of contract.

a. The Appeal Below

The First Circuit Court of Appeals vacated the jury verdict on the grounds that a one year limitation clause concerning services provided under a 1970 written agreement time-barred Catamore's claim for breach of a 1968 oral agreement. The Opinion reasoned that the jury, in following the "clear implication" of the Charge, had to find that the oral agreement and the written agreement were for a similar subject matter if any part of the damages awarded to Catamore under the general verdict were for its claimed breach of contract. Therefore, the Opinion stated the Judge improperly permitted the jury to find that the 1970 written agreement, if not void by fraud, had no effect on Catamore's claim for breach of the 1968 oral agreement. Although no objection to the Charge on those grounds was made, the Court of Appeals ruled that IBM was not precluded from obtaining appellate review of this issue because it had raised the "purely legal objection" in its Motion for a Directed Verdict, which (in the Court's Opinion) satisfied the requirements of Federal Rules of Civil Procedure 51.

Catamore will show that this opinion conflicts with other Circuit opinions and this Court's Opinions concerning the requirements of the Seventh Amendment and Federal Rules of Civil Procedure 51 because the First Circuit re-

laxed the requirements of Rule 51 by improperly holding that IBM's Motion for a Directed Verdict challenged the charge when it did not (Appendix E); granted IBM a new trial on the basis of "error" in an IBM-requested charge; and redetermined facts found by the jury. (Appendix C)

b. The Trial

IBM sued Catamore in the United States District Court for the Rhode Island District for failure to make rental payments, in the amount of $68,453.23 for computer equipment ("hardware") under a 1968 written agreement ("Machine Services Agreement" or "MSA", IBM's Exhibit 1).

Catamore admitted that it had not made the payments, and counterclaimed, alleging that IBM breached a separate 1968 oral agreement for delivery of a set of programs ("software") for a "production control system" (to be created by IBM through a two-step process — "systems design" followed by "programming") for use with the hardware rented under the written agreement. Catamore claimed that it suffered expenses of preparation as well as a failure to attain growth contemplated under the oral agreement.

IBM responded to Catamore's contract counterclaims with at least seven alternative theories, most of which are not relevant here.* Those most nearly related to the grounds specified by the Court of Appeals as error concern the relationship between the 1968 oral agreement and the 1970 written "SES Agreement" and supplemental "SES Estimates" for services (IBM's trial Exhibits 2-11). According to IBM, there was no relationship because the

* (1) There was no agreement; (2) no consideration; (3) Statute of Frauds; (4) Parol Evidence Rule, barred proof of the oral agreement because of the 1968 written agreement; and (5) merger of the 1968 oral and written agreements. These were either later abandoned by IBM or dismissed by the Court of Appeals.

oral agreement (if it existed at all) was only for delivery of systems design, and this was properly delivered to Catamore by the end of 1969; while the 1970 SES Agreement was for the assistance in the "programming" necessary to create a production control system. IBM alternatively argued that, as a *jury* matter, the 1970 SES Agreement would totally supersede Catamore's version of the 1968 oral agreement through a "novation" (because both agreements dealt with programming), and the written SES one year limitation on the bringing of actions "arising out of the services under this Agreement"* barred Catamore's claim for failure to deliver the production control system under the 1968 oral agreement.

Catamore responded that it had never claimed damages for breach of the 1970 SES Agreement and supplemental estimates; that if the oral agreement was only for systems design, IBM breached it, making it impossible for anyone to do the programming. If both agreements dealt with programming, Catamore argued that the 1970 SES Agreement was induced by misrepresentations, and therefore rescinded it; so that it could not operate as a superseding contract even if the jury found that both agreements dealt with programming.

c. The Motion for a Directed Verdict

IBM moved for a directed verdict,** on the grounds of insufficiency of evidence to establish either fraud, or breach of an oral agreement for systems design, which therefore only left Catamore's version of an oral agreement for systems design as well as programming in the face of a valid SES Agreement and required a finding of novation as a matter of law. (P-251-252)

* "The term 'this Agreement' as used herein includes any *future written* amendments, modifications or supplements . . ." Appendix F, SES, 2 (emphasis supplied)

** Appendix M, P-251-257

The trial Judge ruled that there was sufficient evidence on the question of fraud * (T-2709-2711). IBM also argued in its motion that any claimed breach of the 1970 SES Agreement and supplemental SES estimates was time-barred by the one year limitation clause (P-253-4). However, Catamore was not claiming damages for breach of the SES Agreement and supplemental SES estimates. The trial Judge had earlier ruled that it was not ". . . clear whether the subject matter of the SES Agreement and oral agreement were, indeed, the same." (T-131)

Therefore, nowhere in its Motion for a Directed Verdict did IBM ever raise the "purely legal" question, relied upon by the Court of Appeals, of partial integration of the 1970 written one year limitation clause with the 1968 oral agreement, adding "new clauses not inconsistent with any earlier ones".

The only relationship between the 1968 oral agreement and the 1970 SES Agreement that was *possibly* referred to in IBM's Motion was total supersession or substitution (since there was insufficient evidence of fraud)

> . . . under the provisions of said systems engineering agreement, which agreement governs all supplemental agreements between the parties and, by novation, all agreements previously entered into between the parties the plaintiff was not to be "liable for any lost profits." (P-256)

The Court of Appeals specifically stated in its opinion

> we are not deciding that the SES Agreement replaced or superseded the 1968 oral contract in its entirety . . . (Opinion, 17)

and limited itself to partial integration. Nowhere in IBM's Motion (or anywhere else at trial) was partial integration

* The Court of Appeals apparently concurred. (Opinion, 11, 20).

even mentioned, not as a jury question, nor certainly as a matter of law.

REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER OR NOT THE REQUIREMENTS OF RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE ARE SATISFIED BY A MOTION FOR A DIRECTED VERDICT WHICH DOES NOT CONTAIN THE GROUNDS RAISED ON APPEAL

Among the several grounds in Catamore's Petition For Rehearing was the fact that IBM never objected to those portions of the Charge as required by Federal Rules of Civil Procedure 51 which "permitted the jury to conclude that the SES Agreement, if not voided by fraud, had no effect on Catamore's claims of breach . . ." (Opinion, 15) of the oral agreement. In the Court-ordered response to the Petition, IBM argued that it had complied with Rule 51 by objecting to those portions of the Charge. In impliedly rejecting IBM's argument, the Court found

> IBM did raise the purely legal objection to Catamore's contract theories of recovery which was the basis for this Court's decision. As to both oral contract claims, IBM moved for a directed verdict on the ground that the actions had not, as was required by the SES Agreement, been brought within one year of the accrual of the causes of action.
>
> (Opinion, Petition for Rehearing, 2)

Since, in its Motion For a Directed Verdict, IBM never raised the issue of partial integration and specifically never advocated the applicability of the one year limitation clause

to the oral agreements (*supra*, 7-9), does its Motion on other grounds preserve the basis for the First Circuit's Opinion on appeal? The Seventh and Ninth Circuits emphatically hold that it does not.

In *Miller v. New York Central Railroad*, 239 F. 2d 10 (7th Cir. 1956)

> It is correct, as urged by plaintiff, that contributory negligence was not in issue insofar as there was a violation of any statute enacted for his safety . . . However, contributory negligence was in issue as regards plaintiff's claim of general negligence . . . . Thus, an instruction recognizing this distinction was called for . . . . Plaintiff insists that its motion for a directed verdict at the close of all the evidence served the purpose of an objection pursuant to Rule 51. However, this motion merely requested that the court direct the jury to return a verdict for the plaintiff on the issues of negligence and/or contributory negligence raised by the pleadings. *The motion did not contain or even suggest the grounds for such action* and was woefully inadequate for the purpose of making known to the trial court plaintiff's objections or the grounds therefor. See Rule 46, Federal Rules of Civil Procedure, 28 U.S.C.A. . . . It appears from the record that the point urged on appeal was not called to the attention of the trial court in such a manner as to clearly advise it as to the question of law involved, *and therefore this court may not consider the issue.*
>
> (*Miller*, 239 F. 2d 10, 13) (emphasis supplied)

The First Circuit was faced with an identical situation in this case. IBM had not objected to the portions of the Charge which permitted the jury to conclude that the SES Agreement, if not voided by fraud, did not supplement the

oral agreement (and even authored those portions of the Charge, *infra*, 12-14) and neither in IBM's Motion for a Directed Verdict nor anywhere else, were such grounds called to the attention of the trial Court.

The Ninth Circuit recognizes the lack of appellate jurisdiction when

> Appellant asserts on this appeal that plaintiffs are barred from recovery under the contractual aspects . . . because of an express disclaimer of liability . . . . The jury's verdict did not specify the grounds on which they made their award to plaintiffs. However, defendants did not raise the above claimed defenses by objecting to the instructions given on breach of express or implied warranties before the case was submitted to the jury. Although they did raise these defenses in their motion for judgment in accordance with their prior motions for directed verdict . . . .
>
> (*Reed v. AMF Western Tool, Inc.*, 431 F. 2d 345, 349n. (9th Cir. 1970))

This conflict between the First Circuit and the Seventh and Ninth Circuits over the requirements of Rule 51, so important to the sound administration of justice in the Federal judicial system (*infra*, 20 et seq.), can only be resolved by this Court. If the First Circuit Opinion is allowed to stand, disappointed litigants will be able to circumvent the mandate of Rule 51 described by the Seventh and Ninth Circuits as making known to the trial Court the objections and the grounds therefor, by claiming that they raised "the purely legal objection . . . [and thus] fully apprised the district court . . ." (Opinion, Petition for Rehearing, 2). The kind of hair-splitting language distinctions thus facilitated in light of 20/20 hindsight in analysis of actions at trial for wholly unrelated purposes after a lost jury verdict would totally frustrate the requirements of Rule 51.

As this Court has held, Rule 51 requires that

> [O]bjections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.
>
> *Palmer v. Hoffman,* 318 U.S. 109, 119 (1943) and cases cited therein.

Where there has not even been a general exception and the "error" was *never* otherwise brought to the attention of the trial court, IBM may not now obtain a new trial.

2. THE DECISION OF THE FIRST CIRCUIT IS IN CONFLICT WITH THE UNMISTAKABLY CLEAR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES CONCERNING INVITED ERROR

Beyond this Court's holding that Rule 51 requires specific objections, *Palmer v. Hoffman, supra,* the First Circuit's Opinion also conflicts with this Court's prior decisions on invited error — because IBM actually asked the Judge (3 times) to submit the question of *any* relationship between the SES Agreement and the oral agreement to the Jury. (Appendices G, H, J)

– Seven weeks before the end of trial, IBM requested:

> Accordingly, if you find that IBM, at a time prior to the SES Agreement, became contractually obligated under an oral contract . . . *and* if you find further that, by their execution of the SES Agreement, the parties intended (to the extent that such services covered by such oral agreement were the same as or substantially

> similar to the services described in the SES Agreement) that the SES Agreement was to be substituted for such prior oral agreement, then the SES Agreement will be the only contract which you may consider . . . .
>
> Conversely, if you find that the subject matter of the alleged oral contract was sufficiently differentiated from the subject matter of the SES Agreement, so that the latter was not intended as a substitute for the former, then you may consider such oral agreement in determining whether and to what extent IBM is liable to Catamore for breach of contract . . . .
>
> (C-28 – C-29)

– Six weeks before the end of trial, IBM substantially repeated the request when asked specifically about the relationship between the agreements (C-77-78).

– Four weeks before the end of trial, the Court's proposed Charge, containing the IBM requests verbatim, was handed to counsel.

– Two weeks before the end of trial, IBM resubmitted the proposed Charge containing its original requests and added:

> . . . and *if* you find that there was an oral agreement between Catamore and IBM in September 1968 and such agreement was superseded* by the SES Agreement in December 1969, then any action under either agreement is subject to the one year limitation . . . .
>
> (C-206) (emphasis supplied)

---

* Even as a jury question, IBM only raised total supercession (not decided by the Court of Appeals, *supra*). It *never* raised partial integration – neither as a jury question nor (certainly) as a threshhold issue to be determined by the judge. The judge did not use this charge but did instruct "The SES Agreement limits the time period" (C-308) and concerning "substitution" (C-300).

Although IBM deleted much of the Court's proposed Charge on other points (by bracketing) it reviewed and submitted to the Court, unchanged and unobjected to, the following:

> I further instruct you that these disclaimers [in the MSA and SES agreements] have no application to the terms of any oral agreement or agreements that you find were created and not superseded by the SES Agreement as I have already charged.
>
> (C-205)

and

> . . . you may award Catamore damages for prospective lost profits if you find . . . (5) that such lost profits did not result from any transaction within the scope of either the Machine Service Agreement or the SES Agreement, if you find those agreements to be valid and binding.
>
> (C-222-223)

The Charge given to the jury contained all of the above IBM submissions.

Therefore, as this Court has held, even *if* erroneous, IBM

> . . . is in no condition now to take advantage of it, as the instruction actually given was upon the request of [IBM] himself.
>
> *Maxwell Land Grant Co. v. Dawson,* 151 U.S. 586, 606 (1894)

Not only did IBM submit those portions of the Charge which permitted what the First Circuit found to be erroneous, it obviously did not object after the Charge was given to those portions which it had requested.

The Opinion is therefore a direct challenge to this Court's explicit holding that a party may not obtain a new trial on the basis of an error in a Charge which he requested.

3. THE FIRST CIRCUIT'S REVIEW OF THE JURY VERDICT AND FINDING IS IN DIRECT CONFLICT WITH THIS COURT'S AND OTHER CIRCUIT'S OPINIONS CONCERNING THE SEVENTH AMENDMENT

The First Circuit reexamined facts which could only properly be determined by the jury, and removed those factual determinations from any new trial. It has therefore denied Catamore's Seventh Amendment right to a trial by jury in direct contradiction to this Court's and other Circuits' Opinions.

In reviewing the 5,600 page record designated on appeal, the First Circuit did not recognize that IBM's alternative theory and IBM's evidence was that any 1968 oral agreement was for systems design which had been properly completed and delivered prior to the effective date of the SES Agreement (*supra,* 7); see generally Appendix C.*

This Court has long recognized that the Constitution absolutely guarantees a right to trial by jury and that

> . . . the facts there tried and decided cannot be reexamined in any court of the United States, otherwise than . . . upon a new trial . . . ordered by an appellate court for error in law . . . unless a new trial has been granted in [this way] facts once tried by a jury can-

* Perhaps this is why IBM never objected to, and, in fact, requested those portions of the Charge which ". . . permitted the jury to conclude that the SES Agreement, if not voided by fraud, had no effect . . ." on the 1968 oral agreement. IBM could not have consistently argued that the Judge should determine supersession because of identical subject matter on the one hand, while pressing its claim for a jury determination of an oral agreement for only systems design on the other.

not be tried anew, by a jury or otherwise, in any court of the United States.

Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

Here the appellate Court found the Judge committed an "error in law" because he

> . . . permitted the jury to conclude that the SES Agreement, if not voided by fraud, had no effect on Catamore's claims of breach . . .
> (Opinion, 15)

in violation of

> . . . the substantive principle that when . . . free and uncoerced understandings purporting to be comprehensive are solemnized by documents which both parties sign and concede to be their agreement, such documents are not easily by-passed or given restrictive interpretations . . . the judge must first assess the evidence in order to decide [15] whether, under the substantive principle as illuminated by precedents, the jury should do the weighing.
> (Opinion, 14-15)

The First Circuit re-weighed the evidence and found the oral agreement was for a "completely designed and programmed, turnkey production control system" (Opinion, 15) and that the SES Agreement and First Supplemental Estimate was for "the remaining ten percent" (Opinion, 16).*

In its Petition for Rehearing, Catamore pointed out the evidence permitted the trial Judge and the *jury* to find that the oral agreement was not for a turnkey production con-

* Although neither the Agreement nor the estimate refer to a remaining percentage at all.

trol system, nor was the SES Agreement for the last ten percent; e.g.,

> Q. Mr. Racette, on direct you testified that these Systems Engineering Estimates, Plaintiff's Exhibits 3 and 4, were in no way duplicative of the original work agreed to be done between IBM and Catamore; Is that correct?
>
> A. That's what I felt at the time, Mr. Christo, and I still feel that.
> (T-3380)
>
> A. . . . this was new work, this was work that IBM never agreed to do.
> (T-3281)

(Also, see generally, Appendix C).

The Court, in its Opinion denying the Petition, replied

> Catamore cannot now attempt to sustain the jury verdict on the ground that the jury may have concluded that the alleged 1968 oral agreement was for "systems design" and not for a "turnkey production control system". Although the Court's instruction suggested the possibility that the 1968 oral contract might have been found to be for something other than a turnkey production control system . . .
> (Opinion on Petition for Rehearing, 2)

However, the First Circuit went on to state

> . . . the clear implication of the instructions — an implication which Catamore acquiesed in — was that Catamore's ability to recover from the alleged oral contract depended upon the jury's finding an oral agreement for an integrated production control system.
> (Ct. of App. Opinion on Petition for Rehearing, 2-3)

In fact, the Charge contained no such "clear implication", (Appendix E) which means that the First Circuit improperly assumed only one version of the evidence in perceiving an "error in law" and vacating the jury's verdict in direct contradiction to this Court's holding in *Capital Traction Co. v. Hof, supra.*

> . . . Catamore claims that it does not contend that the SES Agreement was breached, but rather its claims arise under one or more oral agreements which were not superseded by the SES Agreement.
>
> (Charge, C-309)

and

> If you find that IBM has breached *any* contract or contract warranty with Catamore, and if you find that Catamore has suffered actual damages as a result of the breach, then Catamore is entitled to damages for all harm naturally flowing from the breach and for such other items as were within the contemplation and understanding of the parties when they made the contract.
>
> (C-320) (emphasis supplied)

The Charge fully recognized that there was conflicting evidence as to what the oral agreement was for:

> Both parties have presented evidence, much of it conflicting evidence, as to the nature and scope of their relationship in September 1968. In determining whether or not any oral promises were made on behalf of IBM to Catamore, and what they were, you should consider from the evidence before you what was actually said and done by each of the parties in relation to the other . . .
>
> (C-296)

and left it to the jury to find a breach of a 1968 oral contract for "something other than a turnkey production control system".

> If you determine that in September 1968 a separate oral agreement was created . . . and that the terms were clearly expressed and reasonably understandable, you must then decide if, as Catamore claims, IBM breached any one or more of its terms.
>
> (C-298)

The First Circuit's perception of a "clear implication" that the Charge did contain such a limitation* therefore cannot excuse its review of

> . . . a pure question of fact which is not reviewable . . . on appeal.
>
> *Trout v. Cassco Corp.,* 191 F. 2d 1022, 1023 (4th Cir. 1951)

and is contrary to repeated decisions in the Fourth Circuit:

> We have no concern with questions of fact, or the weight to be given the evidence which was properly admitted.
>
> *Atlantic Greyhound Corp. v. Lyon,* 107 F. 2d 157, 160 (4th Cir. 1939) and cases cited therein

and flies in the face of this Court's express application of the Seventh Amendment in *Capital Traction Co.* v. *Hof, supra,* and other opinions.

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* While the Court, in giving IBM's instruction 14, did characterize the oral agreement, this was in an isolated section on "novation". However, the Court repeatedly cautioned "you alone decide the facts" and that any examples given were not to be taken as binding (C-269, 270, 271, 273, 295), the 70 page Charge should be "taken as a whole and read in its entirety" *Delancey v. Motichek Towing Service, Inc.,* 427 F. 2d 897, 901 (5th Cir. 1970).

> We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury . . .
>
> *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd. et al.*, 369 U.S. 355, 358-359 (1962)

If the First Circuit's Opinion is allowed to stand, it will therefore enable appellants from cases involving complex fact situations to take advantage of alternative factual theories presented while precluding appellees from doing the same, by allowing an appellate Court to pick and choose evidence as it wishes on the justification of a "clear implication" — but not an express direction — in a lengthy Charge, thus totally circumventing the Seventh Amendment.

If this Court does not act, it might as well rule that appellees in cases involving complex fact situations have no right to a jury verdict against litigious, wealthy appellants who can "ping-pong" the case between trial Court and appellate Court simply by inventing "issues" on an appeal clouded by overdesignation of a lengthy record.

4. THIS CASE RAISES IMPORTANT ISSUES WITH RESPECT TO THE ADMINISTRATION OF JUSTICE IN THE OVERWORKED COURTS IN THE FEDERAL JUDICIAL SYSTEM ON WHICH A CLEAR PRONOUNCEMENT OF THIS COURT IS NOW NEEDED

Rule 51 is not a technicality designed to trap the unwary, but as the Second Circuit has recognized, has a salutary purpose of expediting

> . . . the administration of justice by insuring that the trial judge is informed of possible errors so that he

> may have an opportunity to reconsider his charge, and, if necessary, to correct it.
>
> *Troupe v. Chicago, Duluth and Georgian Bay Transit Co.*, 234 F. 2d 253, 259 (2d Cir. 1956)

This case is a prime example of how basically unfair a relaxation of Rule 51 and the Seventh Amendment, because of an assumed "clear implication" of the Charge, is.

> We find no merit in this argument. We have repeatedly held that a charge "must be viewed as a whole, in connection with the contentions aired by the parties in the Court below, and it must be viewed from the standpoint of the jury.
>
> *Grey v. First National Bank in Dallas*, 393 F. 2d 371, 381 (5th Cir. 1968) and cases cited therein

The nine known lawyers representing IBM at trial had no less than five separate opportunities to find and call to the attention of the trial Judge the "error"*, and not only did not focus on the issue, but actually submitted the Charge.

> Even if one of the instructions given by the court was erroneous . . . [plaintiffs] are in a poor position to complain; it appears that they requested an instruction in all essential respects the same . . . [a] litigant may not simultaneously assign as error both the giving and failure to give the same instruction.
>
> *Arley v. United Pacific Insurance Co.*, 379 F. 2d 183, 188 (9th Cir. 1967)

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* Hindle, Fanning, Edwards and Chaffee from Edwards & Angell; Sweetnam, Schachter and Behan from IBM Corporate legal staff; Hupper and Broadwater from Cravath, Swaine & Moore; at original request, supplemental request on the relationship between the agreements, submission of proposed Charge, review of final Charge, and objections after Charge).

The 19 lawyers representing IBM on Appeal were able to frustrate the requirements of Rule 51 and the Seventh Amendment by designating a 5,600 page record, raising multiple theories which had not been raised before, and thereby obtain a new trial after a unanimous jury, who had sat through the 56 days of evidence and deliberated in sequestration for nine days, unmistakably resolved the issues against IBM.

Of course, some Circuits permit appellate review of points not raised in the trial (in spite of the explicit and strict terms of Rule 51) in certain limited cases to avoid manifest injustice. This Rule of "fundamental error" or "plain error" has been invoked most sparingly, and only if the errors are

> obvious, or . . . seriously affect the fairness, integrity or public reputation of judicial proceedings.
>
> *Troupe v. Chicago, Duluth and Georgian Bay Transit Co.*, 234 F. 2d 253, 260 (2d Cir. 1956).

No Court has ever had occasion to invoke the Rule in a situation such as this, where the party who would benefit from it actually submitted the charge which is assigned as "error". Rather, those Circuits which recognize plain error do so

> [b]ecause, usually, the lawyers, alas do not have in hand the judge's charge in writing before he delivers it, they may overlook errors in the charge, until they receive a transcript after the trial is over.
>
> *Troupe v. Chicago, Duluth and Georgian Bay Transit Co., supra,* at 261n. (dissenting Opinion).

That reason is not present here, because the trial Court gave counsel copies of a draft of the Charge and the final

version of the Charge containing the IBM requests before he read it to the jury.

Beyond the fact that there was no fundamental error and that the requirements for invoking that rule are not present in this case, the First Circuit did not base its decision on that exception, but on the notion that IBM's Motion For a Directed Verdict satisfies the requirements of Rule 51 (when it did not) (Opinion, Petition for Rehearing, 2). That Opinion is not only in conflict with other Circuits, important decisions of this Court, and Rule 51 itself, but is one which is likely to be used many times by appellate counsel who wish to take appeals on issues which, for reasons best known to themselves, trial counsel did not raise clearly and explicitly below.

Thus Catamore must at this juncture face another protracted trial and another appeal (which is anticipated by the present Opinion, 13), after all the issues have been aired and decided properly, because the First Circuit actually violated its own "fundamental" proposition of law and "by-passed" explicit terms in the written SES Agreement which (a) was only for "services" (while the 1968 oral agreement was for *delivery* of either systems design or a production control system); (b) contained no clause authorizing severability of some of its terms to apply to prior agreements; (c) contained "facial ambiguity" concerning its relationship (if any) to prior agreements; (d) neither mentioned a production control system nor that it was for "the remaining ten percent"; (e) by its own "terms", was never in effect because IBM never "accepted" it *; (f) explicitly restricted applicability of the one year limitation to actions "arising out of the services under this Agreement".

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* On the Petition For Rehearing, the Court of Appeals summarily rejected that point because it was not raised before, Opinion, Petition for Rehearing, 2.

However, the manifest injustice to Catamore is dwarfed by the significant future injustice that the First Circuit's Opinion (if allowed to stand) will foment. Every time a party aggrieved by a major corporation has the tenacity and conviction to sue, expecting justice (notwithstanding the First Circuit Opinion), the appellant will have as a part of its arsenal the precedent thus established of relaxing Rule 51 and the requirements of the Seventh Amendment to the point where it may be assured of a vacated jury verdict on appeal. The Courts of Appeals were not established for the purpose of bailing out appellants who have lost their case after a full and fair opportunity to be heard (and more than full representation), and are busy enough.

Filings in appellate Courts have increased from 11,662 in 1970 to 16,658 in 1975, *Management Statistics For United States Courts*, 1975, Director of the Administrative Offices of the United States Courts, Page 13; and appeals per judgeship in civil cases alone have jumped from 57 in 1970 to 80 in 1975, *ibid.* Moreover, the nature and factual setting of the cases coming to the Courts is drastically changing and becoming more complex. In 1965 there were less than 20,000 computers installed in the United States, by 1975 there were some 140,000. In the United States, computer expenditures on an annual basis account for over $35,000,000,000, or somewhat over 3% of the Gross National Product.*

If this Court is not to encourage more appeals which could have easily been avoided; unjustified and unnecessarily protracted appeals which should never be taken in the first place; and is not to discourage aggrieved parties from seeking justice in Courts of law as guaranteed by the Constitution, it must act now. The numbers of cases

* Brandon and Segelstein, *Data Processing Contracts*, Van Nostrand Reinhold Company, p. 5, 1976.

will only grow and their complexity (and in particular, those involving computers) will only increase. Appellants cannot be permitted to hide behind the shield that the facts in the case are a "paradigm of complex litigation, rivalling the complexity of the cybernetics era from which it arises" (Opinion, 1), and thus frustrate the simple and long established legal principles of Rule 51 and the Seventh Amendment by taking advantage of busy appellate Courts who do not have time to throughly review and comprehend a record spanning thousands of pages. Nor can an "extraordinary trial in . . . length [breaking] all records . . . in this Court" (Trial judge, T-3658) be sent back for retrial to a two Judge District Court on such grounds. Without intervention from this Court, that is exactly what will happen in this case.

This Court's firm pronouncement on Rule 51 in particular will serve to redress the recurrent problem of appellants raising issues on appeal for the first time, which has been noted in many Circuits. *Grey v. First National Bank in Dallas*, 393 F. 2d 371 (5th Cir. 1968) (failure to submit request); *Esquire Restaurant, Inc. v. Commonwealth Insurance Co. of New York*, 393 F. 2d 111 (7th Cir. 1968); *Tromza v. Tecumseh Products Co.*, 378 F. 2d 601 (3d Cir. 1967); *Mulligan v. Baltimore & Ohio Railroad Co.*, 296 F. 2d 634 (6th Cir. 1961); *Solomon Dehydrating Co. v. Guyton*, 294 F. 2d 439 (8th Cir. 1961), cert den. 368 U.S. 929 (1961) (invited error); *Arley v. United Pacific Insurance Co.*, 379 F. 2d 183 (9th Cir. 1967) (invited error); *Otten v. Stonewall Insurance Co.*, 511 F. 2d 143 (8th Cir. 1975); *Gradsky v. Sperry Rand Corp.*, 489 F. 2d 502 (6th Cir. 1973); *United States for the Use and Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F. 2d 1077 (2d Cir. 1970), cert. den. 400 U.S. 1021; *Kolman v. Jacoby*, 419 F. 2d 395 (3d Cir. 1969); *Sanders v. Buchanan*, 407 F. 2d 161 (10th Cir. 1969); *De-*

lancey v. Motichek Towing Service, Inc., 427 F. 2d 897 (5th Cir. 1970); *Gillentine v. McKeand*, 426 F. 2d 717 (1st Cir. 1970) (objection on one ground not sufficient to preserve error on another); *Curko v. William Spencer & Son Corp.*, 294 F. 2d 410 (2d Cir. 1961).

Conclusion.

Because the decision of the First Circuit Court of Appeals is in confiict with the decisions of two other Circuits, is in conflict with important decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings that it represents a dangerous precedent which will further encourage the significant and recurring problem of appellants raising issues for the first time in the appellate Court after full and lengthy trial, this Court should issue its Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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